

SACHS WALDMAN
PROFESSIONAL CORPORATION
www.sachswaldman.com

ATTORNEYS AND COUNSELORS AT LAW
1000 FARMER
DETROIT, MICHIGAN 48226-2899

(313) 965-3464

Writer's Direct Dial: (313) 496-9429
Facsimile Number: (313) 965-4602
E-Mail: anickelhoff@sachswaldman.com

December 20, 2004

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(248) 334-0582
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BRISTOL WEST CENTER
FLINT, MICHIGAN 48507-5500
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FAX (810) 235-7239

THEODORE SACHS
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RONALD S. WEINER
JAMES M. MONDRO
D. BRUCE BEATON
OF COUNSEL

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Office of the General Counsel
FEC
999 E St. NW
Washington DC 20463

re: MUR 5600

Dear Sirs:

I am writing on behalf of the Michigan Democratic State Central Committee ("MDSCC") and Alan Helmkamp, Treasurer, in response to the above Complaint. Also enclosed in support of this Response are the Affidavits of Mark Fisk and Michael Robbins. For the reasons stated below, the Complaint is without merit and should be dismissed.

The Complaint is premised on two assertions: first, that the MDSCC's mail piece attached to the Complaint (referred to in this response as "the mail piece") is federal election activity, and second, that the mail piece constituted a coordinated communication resulting in an in-kind contribution by MDSCC to the re-election campaign of Congressman John Dingell. These assertions are addressed sequentially below.

A. The Mail Piece Was Not Federal Election Activity.

The mail piece was not "federal election activity" as defined in 2 U.S.C. § 431(20)(A) and 11 CFR 100.24(b)(3). The FECA defines "federal election activity" for these purposes as an expenditure for a public communication that "refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." The mail piece was a "public communication," because it was a mass mailing. 11 CFR 100.26, 100.27. It clearly identified Congressman John Dingell. However, by no means did the mail piece promote or support John Dingell's candidacy.

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The mail piece focused on issues concerning senior citizens. One panel showed a photograph of seniors with the caption, "They're always there for us." A two-panel section stated, "Kathy Angerer supports seniors and veterans." It discussed the problem of rising health care costs and Angerer's plan to reduce prescription drug costs, as well as Angerer's commitment to veterans. Neither of these portions referred to Congressman John Dingell. The addressee panel displayed a quotation attributed to Congressman John Dingell superimposed on a photograph of Dingell and Angerer.

The sole statement attributed to Congressman Dingell in the mail piece is: "Kathy Angerer has a plan for affordable health care and prescription drugs. She knows that we need to stand by our seniors and veterans." The speaker is identified as, "Congressman John Dingell" (rather than, for example, "John Dingell, candidate for Congress"). There is no language in the mail piece that expressly or even impliedly relates to Congressman Dingell's campaign for re-election.

In Advisory Opinion 2003-25, the Commission considered a situation in which a U.S. Senator running for reelection appeared in a television advertisement endorsing a candidate for Mayor. In that case, the U.S. Senator dominated the advertisement. The Commission's analysis of the television ad, set forth in full below, applies here:

[T]he critical question (under section 441i(f)) is whether the 'Committed' advertisement promotes, supports, attacks, or opposes Senator Bayh. The Commission concludes that it does not. Under the plain language of the FECA, the mere identification of an individual who is a Federal candidate does not automatically promote, support, attack, or oppose that candidate. Sections 431(20)(A)(iii) and 441i(f) expressly set forth separate requirements that a communication must 'refer to a clearly identified candidate' and 'promote, support, attack, or oppose' that candidate in order to constitute Federal election activity. See also, 11 CFR 100.24(b)(3), 300.71, and 300.72. It is a settled rule of statutory construction that each word and phrase in a statute is intended to have 'particular, nonsuperfluous meaning.' *Bailey v. United States*, 516 U.S. 137, 146 (1995).

The Commission cited BCRA legislative history making it clear that public communications that feature a federal candidate endorsing a non-federal candidate do not entail the use of federal funds, unless they also promote or support the federal candidate (or attack or

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oppose his or her opponent).¹

The brief statement by Congressman Dingell and the photograph of the Congressman with Kathy Angerer does not amount to federal election activity, without an element of promotion or support concerning Mr. Dingell's campaign. Because that element is completely missing from the mail piece, the Complaint allegations based on federal election activity do not meet the threshold requirements for further action by the Commission.

B. The Mail Piece Was Not A "Coordinated Communication."

The mail piece was not coordinated with John Dingell or with his committee, Dingell for Congress,² and accordingly the MDSCC's expenditure for it was not an in-kind contribution to John Dingell under 2 U.S.C. § 441a(a)(7)(B)(i). All of the requirements set forth in 11 CFR 109.21 must be met before a public communication is treated as a "coordinated communication." 11 CFR 109.21(a). Because there was no activity falling within the conduct standards set forth in 11 CFR 109.21(d), the mail piece cannot be treated as a coordinated communication. 11 CFR 109.21(a)(3).

The Complaint avers that the conduct standard is satisfied simply because Congressman Dingell "appears and offers a quote/message" in the mail piece, citing Advisory Opinion 2004-1. That conclusory statement comprises the sum total of the Complainant's factual support for the allegation of coordination. In AO 2004-1 and in other opinions, the Commission has discussed whether the appearance of a federal candidate endorsing another candidate in a television ad constitutes a coordinated communication. The Commission has not concluded that the mere fact of a candidate's appearance in a public communication endorsing another candidate amounts to coordination *per se* with the maker of the communication. Such a presumption of coordination would, of course, be constitutionally invalid. *FEC v. Colorado Republican Federal Campaign Committee*, 518 U.S. 604 (1996). Evidence of actual material involvement or other conduct satisfying 11 CFR 109.21(d) must be required in any case where a coordinated communication is alleged.

¹ While AO 2003-25 dealt with expenditures by a local candidate covered under Section 441i(f), the federal election activity analysis is the same as applied to a state political party.

² Respondents will refer to Congressman Dingell and Dingell for Congress, and any of their agents, collectively, as "John Dingell," unless the context calls for a more specific reference.

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As discussed below, the MDSCC did not produce or distribute the mail piece "in cooperation, consultation, or concert with, or at the request or suggestion of" John Dingell, under the four specific conduct standards set forth in the Regulation.

1. The mail piece was not produced at the request or suggestion of John Dingell.

The attached Affidavit of Mark Fisk, who supervised production of the mail piece for the MDSCC, states that neither Congressman Dingell nor Dingell for Congress, or any of their agents, requested that the mail piece be produced or that Congressman Dingell appear or be quoted in it. (Affid. of Mark Fisk, ¶ 6) Likewise, Michael Robbins, John Dingell's re-election Campaign Manager, also states in his attached Affidavit that John Dingell did not request or suggest the mail piece or that the Congressman appear in it. (Affid. of Michael Robbins ¶ 7) The idea for the mail piece was solely the MDSCC's. (Mark Fisk Affid. ¶ 5)

2. John Dingell had no material involvement in the mail piece.

The mail piece was entirely the creation of the MDSCC. Its planning, production, and distribution were undertaken solely by the MDSCC and without any involvement by John Dingell. The "material involvement" prong of 11 CFR 109.21(d)(2) requires that John Dingell have been materially involved in the MDSCC's decisions regarding the content, intended audience, means of communication, timing, or size or prominence of the mail piece.

The Affidavits filed with this Response show that there was absolutely no involvement by John Dingell in any of those decisions. Mark Fisk states that John Dingell had no involvement whatsoever in determining the content of the mail piece (including the text and images, size and layout), the production of the mail piece (including selection of graphic designer, printer, etc.); the distribution of the mail piece (including selection of recipients, method of mailing, etc.); and the timing of the distribution. (Fisk Affid. ¶ 7) The Dingell quotation in the mail piece originated with the MDSCC and was not supplied by the candidate or his committee. (Fisk Affid. ¶ 8)³ Neither the Congressman nor any of his

³ Congressman Dingell's positions on the public issues discussed in the mail piece, and the reasons for his endorsement of Kathy Angerer's positions on those issues, were well-known and widely publicized. The "Team Dingell" program, which highlighted the Congressman's support for Kathy Angerer, was prominently featured on the Congressman's web site. (Fisk Affid., ¶ 8, Exh. A) The mail piece simply incorporated the kind of public statement Congressman Dingell had made in the past.

campaign staff reviewed or approved the quotation before it was published in the mail piece. (Id. ¶ 8) The photograph featuring Congressman Dingell was the MDSCC's. It was not provided by John Dingell nor was it reviewed or approved by John Dingell. (Fisk Affid. ¶ 9).

Had Congressman Dingell or his campaign staff been involved to any extent in the mail piece, Michael Robbins would have known about it. (Robbins Affid. ¶ 6) The first time Robbins saw or knew of the mail piece was when he received a copy of the Complaint. (Robbins Affid. ¶ 5) Robbins states that neither Congressman Dingell nor any member of his campaign staff requested or suggested the mail piece or that Congressman Dingell be included in it. (Robbins Affid. ¶ 7) John Dingell had no involvement in any decisions by MDSCC concerning the mail piece; nor did the quotation or photograph originate with John Dingell. (Robbins Affid. ¶¶ 8,9)

The Commission opined in AO 2004-1 that the appearance of the President endorsing a candidate for Congress in a television advertisement paid for by the congressional candidate's committee would constitute a coordinated communication, based on the President's material involvement. In that case, the proposed advertisement would have featured video and audio of the President endorsing and supporting the candidate. While the President's campaign committee would not have been involved in suggesting, requesting, scripting or designing the ad, the Commission found sufficient material involvement based on the fact that agents of the President would review the final script in advance of the President's appearance to ensure quality and consistency with the President's positions. The Commission quoted from AO 2003-25, discussed above, which concluded that a television advertisement featuring a U.S. Senator endorsing a local candidate for Mayor – also with final review and approval by the federal candidate – was a coordinated communication, as follows:

Given the importance of and potential campaign implications for each public appearance by a Federal candidate, it is highly implausible that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions regarding the communication.

See also, AO 2004-29, quoting the same passage in the context of the proposed appearance by a federal candidate in radio or television advertisements supporting a ballot initiative.

The Advisory Opinions concerning candidate endorsements discussed above do not support a finding of material involvement in this case. Advisory Opinions 2004-1 and 2003-25 were expressly premised on prior review and approval of the television ad script

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by the federal candidate. Likewise, the federal candidate in AO 2004-29 would have retained control over his appearance and would have prepared, or at least reviewed, any statement attributed to him. The candidate's material involvement suggested by "approval or disapproval of the other person's plans" (AO 2004-1, quoting, 68 Fed. Reg. at 434) simply is not present here. John Dingell did not review or approve the quotation before it was printed and distributed in the MDSCC's mail piece.

The passage from AO 2003-25 quoted above might be construed as suggesting a presumption that a federal candidate's appearance in a public communication necessarily entails his or her material involvement in the making of the communication. (See also, AO 2004-29, stating that (in AO 2003-25) "the Commission concluded that the conduct standard is met where a Federal candidate appears and speaks in a communication.") As stated above, any such presumption of material involvement would be invalid. Further, the reasoning applied in the case of a television or radio appearance cannot be applied wholesale to a printed public communication. A candidate whose "live" image and voice are projected in a television or radio communication arguably exerts some degree of control over the content of the ad through his or her appearance, actions, intonations, etc. A candidate's participation in a videotaped television ad cannot be accomplished without significant interaction and cooperation with the maker of the ad.

The printed mail piece at issue here is different. It is entirely possible that a candidate's words or image could be incorporated into a printed public communication without the candidate's knowledge, much less his material involvement. Indeed, that is precisely what took place here. At least with respect to printed matter, it cannot be assumed that a candidate was materially involved simply because he or she "appears and offers a quote/message," as the Complaint avers. John Dingell had no material involvement – in fact, no involvement at all – in the MDSCC's decisions concerning the mail piece.

3. John Dingell did not engage in substantial discussion with MDSCC regarding the mail piece within the meaning of 109.21(d)(3).

It is obvious from the foregoing discussion that there was no substantial discussion between MDSCC and John Dingell concerning the mail piece. The Regulations state that a discussion is "substantial" if two requirements are met: first, information about the candidate's plans, projects, activities or needs must be conveyed to the person paying for the communication; and second, the information must be material to the creation, production, or distribution of the communication. 11 CFR 109.21(d)(3). If Congressman Dingell or his committee communicated with officials of MDSCC regarding the Congressman's campaign plans, projects, activities and needs, Mark Fisk was not aware of it and none of that information related to the mail piece or affected any decisions made

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by MDSCC concerning the mail piece. (Fisk Affid. ¶ 10)

4. No common vendors were involved.

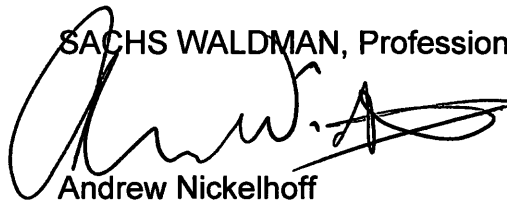
No shared or common vendors were used in the production or distribution of the mail piece. (Fisk Affid. ¶ 11)

For the above reasons the mail piece was not a coordinated communication as defined in the Regulations. The Complaint's allegation of an in-kind contribution by MDSCC to Congressman Dingell's campaign is completely unfounded, and does not warrant further action by the Commission.

Please contact me should you require additional information regarding this matter.

Yours truly,

SACHS WALDMAN, Professional Corporation



Andrew Nickelhoff

cc: Mark Brewer, Chair

AFFIDAVIT OF MICHAEL T. ROBBINS II

MICHAEL T. ROBBINS II, having been duly sworn, deposes and states as follows:

1. I make this affidavit from personal knowledge and my statements are true and accurate to the best of my knowledge, information and belief.
2. During the November, 2004 general election campaign I held the position of Campaign Manager for Congressman John Dingell's campaign for re-election.
3. Included in my responsibilities as campaign manager was oversight of any public communications relating to John Dingell's campaign for re-election.
4. I have reviewed a copy of a mail piece paid for by the Michigan Democratic State Central Committee ("MDSCC") attached to the Complaint dated November 2, 2004 filed by Greg McNeilly, which is referred to in this affidavit as "the mail piece."
5. I had never seen or been aware of the mail piece until after the Republican Party announced the filing of a Complaint concerning the mail piece.
6. Had there been any involvement or participation by Congressman John Dingell or his committee, Dingell for Congress, in the production or distribution of the mail piece, I would have had knowledge of it.
7. Neither John Dingell nor Dingell for Congress, nor any of their agents, requested or suggested that the MDSCC produce the mail piece or that a quotation or photograph of John Dingell be included in the mail piece.
8. Neither John Dingell, nor Dingell for Congress, nor any of their agents, had any involvement in any decisions by MDSCC concerning the mail piece, including the content, appearance, target audience, distribution, or selection of vendors.

9. Neither Congressman Dingell, nor any agent of the Congressman or his committee, supplied the quote attributed to him in the mail piece to the MDSCC. The photograph of John Dingell with Kathy Angerer used in the mail piece was not provided to the MDSCC by the Congressman or his committee.
10. Neither Congressman Dingell, nor any agent of the Congressman or his committee, reviewed the mail piece or the quotation or the photograph of Congressman Dingell prior to printing and distribution of the mail piece.

FURTHER AFFIANT SAYETH NOT.


MICHAEL T. ROBBINS II

Subscribed and sworn to before me
this 17th day of December, 2004.

Michael J. Orrick
Notary Public, District of Columbia
My Commission Expires 3-14-2008



NOTARY PUBLIC, _____ Washington, DC
My Commission Expires:

O:\General\Nikkelhoff\MDP\FEC\MUR5600\michaelrobbins affidavit.wpd

AFFIDAVIT OF MARK FISK

STATE OF MICHIGAN)

) ss.

WAYNE
COUNTY OF ~~MICHIGAN~~)

MARK FISK, having been duly sworn, deposes and states as follows:

1. I make this affidavit from personal knowledge and my statements are true and accurate to the best of my knowledge, information and belief.
2. During the November, 2004 general election campaign I supervised the production and distribution of printed literature informing the public regarding important issues for the Michigan Democratic State Central Committee ("MDSCC").
3. I supervised the production and distribution of the mail piece attached to the Complaint in this matter (which is referred to in this Affidavit as "the mail piece").
4. Mark Brewer, Chair of the MDSCC, had sole authority to approve the mail piece and authorize its production and distribution.
5. The mail piece was produced and distributed by the MDSCC with absolutely no involvement by Congressman John Dingell or Dingell for Congress, or any of their agents. The idea for the mail piece was solely the MDSCC's. The idea for the mail piece was developed in discussions I had with Mark Brewer.
6. John Dingell did not suggest or request that the MDSCC produce or distribute the mail piece or that the mail piece include his image or quotation. No agent of John Dingell or of Dingell for Congress suggested or requested that the MDSCC produce or distribute the mail piece or that the mail piece include John Dingell's image or quotation.
7. Neither John Dingell, nor Dingell for Congress, nor any of their agents, had any involvement in any decisions by MDSCC concerning the mail piece, including but not limited to decisions concerning the content of the mail piece (including the text and images, size and layout), the production of the mail piece (including selection of graphic designer, printer, etc.); the distribution of the mail piece (including selection of recipients, method of mailing, etc.), and the timing of the distribution.

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8. The quotation in the mail piece attributed to John Dingell was developed by agents of MDSCC, without any input from John Dingell or Dingell for Congress or any of their agents. Dingell's position on the issues discussed in the mail piece, and his approval and endorsement of Kathy Angerer's positions on those issues, were well-known and widely publicized. For example, the "Team Dingell" program, which highlighted the Congressman's support for Kathy Angerer, was prominently featured on Congressman Dingell's web site. A page from the web site is attached as Exhibit A. The MDSCC did not seek or obtain review or approval of the Dingell quotation by John Dingell or Dingell for Congress before the mail piece was produced and distributed.

9. The photograph of Congressman Dingell and Kathy Angerer used in the mail piece was the property of the MDSCC. The photograph was not provided by John Dingell or Dingell for Congress. It was not submitted to John Dingell or Dingell for Congress for approval before the mail piece was produced and distributed.

10. I had no knowledge concerning the Dingell campaign's plans, projects, activities or needs. No such information played any role in decisions concerning the mail piece.

11. To my knowledge, none of the vendors used for the design, printing or mailing of the mail piece were vendors used by Dingell for Congress in the November, 2004 general election campaign.

FURTHER AFFIANT SAYETH NOT.

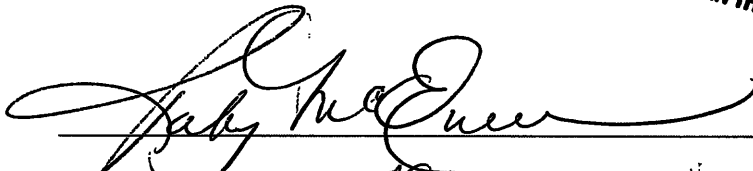


MARK FISK

Subscribed and sworn to before me

this 17 day of December, 2004.

RUBY D. McQUEEN
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Feb 13, 2008
ACTING IN THE COUNTY OF



NOTARY PUBLIC, Wayne COUNTY, MI.

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My Commission Expires: *2/13/06*

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**JOHN D.
DINGELL**

FOR U.S. CONGRESS

15th District of Michigan

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9/3/2004

"TEAM DINGELL" PREDICTS A WINNING SEASON FOR WORKING FAMILIES

Location: Monroe, MI

Contact Person: Michael Robbins
Contact Phone: 313-791-2707

"TEAM DINGELL" PREDICTS A WINNING SEASON FOR WORKING FAMILIES
Congressman says Angerer, Kehrl will hit the ground running in Lansing

MONROE – In the shadow of the Monroe High School goal posts, U.S. Rep. John Dingell (MI-15) today kicked off a Democratic game plan he calls "Team Dingell," which begins with sending State House candidates Kathy Angerer and Herb Kehrl to Lansing.

"Kathy Angerer and Herb Kehrl are part of my team. We can count on them to fight for a first-class education for our children, create and protect Michigan jobs, and provide our seniors with affordable prescription drugs and health care," Dingell said. "Kathy and Herb are the team we need in Lansing and I urge every voter to rally behind Team Dingell."

Both Democrats, Kehrl is running in the 56th District and Angerer in the neighboring 55th District.

Dingell added, "Working families can trust Herb and Kathy to act on the issues vital to residents of Monroe and Washtenaw counties when they get to Lansing."

Team Dingell's goals include:

- Protecting jobs and stopping outsourcing;
- Fighting for more affordable health care and cheaper prescription drugs;
- Curbing the importation of out-of-state trash and protecting the Great Lakes;
- Strengthening K-12 public education and shielding our schools from the effects of economic downturns;
- Being committed to pro-family, pro-Second Amendment philosophies.

Stressing the need for a combined effort at the state and federal levels to accomplish the goals, Angerer called it an "honor and privilege to be part of Team Dingell."

"Congressman Dingell understands the importance of making sure our community's

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issues get the attention they deserve in Lansing and so do I," Angerer said. "I am proud to have earned his support and I pledge to live up to the expectations of the working families of Monroe and Washtenaw Counties."

Kehrl said he was humbled by Dingell's endorsement and that he "looks forward to "bringing Monroe County values and ideas to Lansing."

"I know Kathy and I agree that it's time Lansing took a few lessons from Monroe County," Kehrl said. "Together, we'll stand up for working families and show Lansing how it's done."

###

Paid for by the John D. Dingell for Congress Committee

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